

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER STEVENS,

Defendant and Appellant.

D052090

(Super. Ct. No. SDC203007)

APPEAL from a judgment of the Superior Court of San Diego County, Julia Craig Kelety, Judge. Affirmed.

A jury found Christopher Stevens guilty of battery with serious bodily injury (count 1: Pen. Code,<sup>1</sup> § 243, subd. (d), hereafter § 243(d)). The jury deadlocked as to whether Stevens personally used a pool cue as a deadly weapon, but found true the allegation that he personally inflicted great bodily injury in committing the battery

---

<sup>1</sup> All further statutory references are to the Penal Code.

(§ 1192.7, subd. (c)(8)). The jury also deadlocked on whether Stevens committed assault with a deadly weapon (count 2: § 245, subd. (a)(1)). After granting the People's motion to dismiss count 2 and the allegations as to which the jury was unable to return a verdict, the court sentenced Stevens to state prison for the upper term of four years on count 1.

Stevens appeals, contending (1) the court erroneously omitted bracketed language in the CALCRIM No. 3470 self-defense instruction pertaining to a defendant's right to stand his ground and not retreat, thereby unconstitutionally lightening the prosecution's burden to disprove self-defense beyond a reasonable doubt; (2) he was prejudiced because the jury instructions under CALCRIM No. 358 relating to his out-of-court oral statements did not include the warning that the evidence of those statements should be considered with caution; (3) the court's cumulative errors in the jury instructions rise to the level of prejudicial error requiring reversal; (4) the court abused its discretion in imposing the upper prison term for the section 243(d) offense by improperly relying on factors that were already elements of the crime, thereby violating California Rules of Court,<sup>2</sup> rule 4.420(d); and (5) the court considered facts not found by the jury in imposing the upper term in violation of *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*). We affirm the judgment.

---

<sup>2</sup> All further rule references are to the California Rules of Court.

## FACTUAL BACKGROUND

### *A. The People's Case*

On February 19, 2006, Omar Naim was playing pool after midnight with Stevens at a Pacific Beach bar called The Open Bar. At the end of the game, when Naim began to shoot the cue ball at the eight ball, Stevens asked whether Naim wanted to bet on the shot. Naim told Stevens he did not play pool for money. The two men began arguing. Stevens, while standing on the opposite side of the pool table from where Naim was standing, said, "What[re] you worried about? It's just a straight [shot]. Why don't you bet? Don't be afraid." Naim kept repeating that he did not play for money. Stevens's demeanor changed and, by asking other questions, he did not allow Naim to proceed with his game. Naim became worried when Stevens, who like Naim was holding a pool cue, moved around the table to within two or three feet of Naim and said, "You don't have any friends in this place." Naim, who felt that Stevens was invading his personal space, became irritated and may have raised his voice.

Naim's coworker Joseph Howard walked over to the men and got in between them, trying to calm the situation. Because he knew Naim, and Stevens was a stranger to him, Howard spoke to Naim. Believing the argument would not lead to a fight, Howard turned and started to walk away. Then, out of the corner of his eye, Howard saw Naim fall backwards to the ground, grabbing his face and rolling over to his side. Naim testified that as Howard walked away, Naim turned his face back toward the bar and that was all he remembered before he was on the floor.

Seeing Stevens quickly leaving the bar immediately after Naim fell to the floor, Howard contacted bouncer Patrick Smith and directed his attention to Stevens. Smith had not seen the incident. Smith heard Stevens say, "I am not going to take any shit from that beaner."

Howard followed Stevens outside the bar where Stevens got into his truck and drove away. Howard wrote down the license plate number.

Responding police officers collected a pool cue that was missing the tip, and obtained the license plate number that Howard had written down, as well as a description of the man who had been involved in the incident with Naim. At trial, the defense stipulated that Stevens was the individual involved in the incident with Naim.

When Stevens was arrested, he measured six feet one inch tall and weighed 240 pounds. Naim was about five feet six inches tall and weighed about 185 pounds.

Naim was seriously injured in the incident. David Najafi, a board-certified ophthalmologist and retina specialist, testified that Naim suffered a very large hemorrhage behind his right eye, a shattered orbital socket, a very large laceration to his upper right eyelid at the corner of the eye, a laceration on his lower eyelid, a torn tear duct, a scratched cornea, and a contusion to his retina. Naim underwent six surgeries to repair the damage, and he now occasionally experiences double vision.

#### *B. The Defense*

Stevens did not testify. The defense, which relied on the theory of self-defense, rested on the evidence presented during the prosecution's case-in-chief. On cross-examination, Howard testified that Naim was upset during the argument with Stevens,

and he (Howard) stepped in to calm the situation down. Howard also stated he did not see Stevens strike Naim, and he did not know who made the first move towards the other person.

Smith testified on cross-examination that he did not see the incident between Stevens and Naim. Smith acknowledged that when the police interviewed him after the incident, he did not report that Stevens had made a racist remark.

## DISCUSSION

### I. *CALCRIM NO. 3470*

Stevens first contends the court erroneously omitted bracketed language in the CALCRIM No. 3470 self-defense instruction pertaining to a defendant's right to stand his ground and not retreat, thereby unconstitutionally lightening the prosecution's burden to disprove self-defense beyond a reasonable doubt. We reject this contention.

#### A. *Background*

In his closing arguments to the jury, defense counsel argued that Stevens struck Naim in self-defense. Without objection by the defense, the court instructed the jury on self-defense under a modified version of CALCRIM No. 3470 requested by the prosecution.<sup>3</sup> As Stevens points out on appeal, the court omitted the following optional

---

<sup>3</sup> The court gave the following modified instruction under CALCRIM No. 3470: "The defendant is not guilty of Battery with Serious Bodily Injury and Assault with a Deadly Weapon if he used force against the other person in lawful self-defense. The defendant acted in lawful self-defense if: [¶] 1. The defendant reasonably believed that he was in imminent danger of suffering bodily injury or was in imminent danger of being touched unlawfully; [¶] 2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger; [¶] AND [¶] 3. The defendant used no

language found in brackets in CALCRIM No. 3470 amplifying the self-defense instructions: "A defendant is not required to retreat. He is entitled to stand his ground and defend himself and, if reasonably necessary, to pursue an assailant until the danger of death/bodily injury has passed. This is so even if safety could have been achieved by retreating."

*B. Applicable Legal Principles*

The trial court must instruct the jury "on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request." (*People v. Rogers* (2006) 39 Cal.4th 826, 866.) This obligation, for example, requires instructions on lesser included offenses if there is substantial evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser. (*Id.* at pp. 866-867.)

---

more force than was reasonably necessary to defend against that danger. [¶] Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of violence to himself. Defendant's belief must have been reasonable and he must have acted because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful self-defense. [¶] When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense. If the People have not met this burden, you must find the defendant not guilty of Battery with Serious Bodily Injury and Assault with a Deadly Weapon."

In contrast to lesser included offenses, a trial court's duty to instruct sua sponte, or on its own initiative, on particular defenses is more limited and arises only if it appears the defendant is relying on such a defense or if substantial evidence supports such a defense and the defense is not inconsistent with the defendant's theory of the case. (*People v. Barton* (1995) 12 Cal.4th 186, 195.) However, a trial court's refusal to give self-defense instructions will be upheld on appeal where the record contains no substantial evidence to support the instructions. (*In re Christian S.* (1994) 7 Cal.4th 768, 783; *People v. Hill* (2005) 131 Cal.App.4th 1089, 1101, disapproved on another ground in *People v. French* (2008) 43 Cal.4th 36, 48, fn. 5.) In this context, substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982–983.)

### C. Analysis

Because Stevens contends for the first time on appeal that the modified version of CALCRIM No. 3470 the court gave to the jury was incomplete, we conclude he waived his claim of instructional error by failing to raise the asserted deficiency in the trial court. "A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Lang* (1989) 49 Cal.3d 991, 1024.) Having failed to request amplifying language, Stevens may not raise this instructional challenge for the first time on appeal.

Were it necessary to reach the merits of Stevens's instructional error claim, we would conclude the court did not err in omitting the portion of CALCRIM No. 3470 pertaining to a defendant's right to stand his ground and not retreat, as substantial evidence did not support the giving of that portion of the instruction. In California, a person who is threatened with an attack that justifies the exercise of the right of self-defense need not retreat. (*People v. Rhodes* (2005) 129 Cal.App.4th 1339, 1346; see also CALJIC No. 5.50 ("Self Defense—Assailed Person Need Not Retreat"); 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, § 74, p. 408.)

Stevens does not challenge the portion of CALCRIM No. 3470 indicating that lawful self-defense requires proof that the defendant reasonably believed he was in imminent danger of suffering bodily injury or of being touched unlawfully. As already discussed, the bracketed portion of CALCRIM No. 3470 that the court omitted states in part that "[a] defendant is not required to retreat" and "is entitled to stand his ground and defend himself . . . *until the danger of death/bodily injury has passed.*" (Italics added.) The foregoing italicized phrase, "until the danger of death/bodily injury has passed," when considered with the portion of CALCRIM No. 3470 indicating that lawful self-defense requires proof the defendant reasonably believed he was in imminent danger of suffering bodily injury or of being touched unlawfully, plainly indicates a defendant is not required to retreat and has a right to stand his ground and defend himself, if he is threatened with an imminent danger of suffering bodily injury or of being touched unlawfully. This interpretation of CALCRIM No. 3470 is consistent with California law.

(*People v. Rhodes, supra*, 129 Cal.App.4th at p. 1346; see also CALJIC No. 5.50; 1 Witkin & Epstein, Cal. Criminal Law, *supra*, Defenses, § 74, p. 408.)

Here, the record is devoid of substantial evidence showing Stevens had both an actual belief and an objectively reasonable belief that he was threatened with such an imminent danger at the time he struck Naim in the eye. The evidence established that Stevens and Naim were arguing about Naim's unwillingness to bet on Naim's next pool shot, which if successful would have resulted in Naim winning the game. The undisputed evidence shows that when Naim repeatedly refused Stevens's requests that he bet on the shot, Stevens came around the pool table and stood no more than three feet from Naim, making Naim feel uncomfortable. Naim became worried when Stevens said, "You don't have any friends in this place." Naim's coworker, Howard, got in between Naim and Stevens and spoke to Naim to calm the situation. As Howard turned and started walking away, believing the argument would not lead to a fight, Stevens struck Naim in the eye, possibly with a pool cue, knocking Naim backwards to the floor. Stevens then quickly left the bar.

From the foregoing substantial evidence, any reasonable trier of fact could conclude beyond a reasonable doubt that Stevens provoked the argument by pestering Naim with his requests that Naim bet on his pool shot and by moving around the table, standing very close to Naim, and telling him he (Naim) had no friends in the bar.

Without citation to the trial record, Stevens asserts "[t]here was substantial evidence available that [Stevens] struck [Naim] in response to a *threatening move* by [Naim]." (Italics added.) There is no evidence in the trial record to show that Naim

made any "threatening move" against Stevens. From Howard's testimony that as he turned and began walking away he believed the argument would not result in a fight, the jury could reasonably conclude his intervention defused the situation. We conclude there is no substantial evidence showing Stevens reasonably believed he was in imminent danger of suffering bodily injury or of being touched unlawfully at the moment he struck Naim in the eye, and thus the evidence was insufficient to support the giving of the portion of CALCRIM No. 3470 pertaining to a defendant's right to stand his ground and not retreat.

Even if we were to conclude the court committed instructional error by omitting from its instructions under CALCRIM No. 3470 the portion pertaining to a defendant's right to stand his ground and not retreat, we would conclude any such error was harmless under the *Watson* standard as it is not reasonably probable Stevens would have obtained a more favorable verdict in the absence of such error. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Lee* (2005) 131 Cal.App.4th 1413, 1429 [applying *Watson* standard to refusal to instruct on self-defense].) Alternatively stated, based on our review of the record in this case, we are confident the assumed instructional error did not result in a miscarriage of justice. (Cal. Const., art. VI, § 13 ["No judgment shall be set aside . . . in any cause, on the ground of misdirection of the jury . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice"].) There is no evidence from which a trier of fact could reasonably find that Stevens was reasonably defending himself

or had the right to not retreat in the face of some action by Naim against him, when he attacked Naim.

## II. *CALCRIM No. 358*

Stevens next contends he was prejudiced because the jury instruction under CALCRIM No. 358 relating to an out-of-court oral statement ("I am not going to take any shit from that beaner") that, according to a witness, Stevens made, did not include the warning that the evidence of that statement should be considered with caution.

### A. *Background*

Smith, the bouncer, testified he heard Stevens say, "I am not going to take any shit from that beaner," after Stevens, who seemed in a hurry to leave the bar, walked past him, and then talked to himself while standing by himself at a corner about five to seven feet away from Smith.

The court instructed the jury under CALCRIM No. 358, as follows: "You have heard evidence that [Stevens] made oral or written statements before the trial. You must decide whether or not [Stevens] made any of these statements, in whole or in part. If you decide that [Stevens] made such statements, consider the statements, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to such statements."

### B. *Applicable Legal Principles*

An admission is an extrajudicial statement, whether inculpatory or exculpatory at the time it was made, that tends to prove guilt when considered with the rest of the evidence. (*People v. Shoals* (1992) 8 Cal.App.4th 475, 497-498.) A trial court has a duty

to sua sponte instruct the jury to view evidence of an oral admission with caution.

(*People v. Bunyard* (1988) 45 Cal.3d 1189, 1224.)

However, the failure to so instruct is not reversible "if upon a reweighing of the evidence it does not appear reasonably probable that a result more favorable to defendant would have been reached in the absence of the error." (*People v. Stankewitz* (1990) 51 Cal.3d 72, 94.) "In assessing potential prejudice, the primary purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made." (*Ibid.*)

### C. Analysis

Applying the foregoing principles, we first conclude that Smith's testimony he heard Stevens say "I am not going to take any shit from that beaner" is evidence of an admission by Stevens because it tended to prove Stevens's guilt when considered with the rest of the evidence, and thus the court erred by failing to include cautionary language in the instructions on a defendant's oral out-of-court statements. (*People v. Bunyard, supra*, 45 Cal.3d at p. 1224.) The statement, if believed by the jury, circumstantially supported a finding that Stevens intended to commit the charged crime.

However, we are persuaded there is no reasonable probability the jury would have reached a different result absent the instructional error. No witness contradicted Smith's testimony concerning Stevens's statement. No witness contradicted the testimony of Naim and Howard regarding Stevens's behavior and the events immediately preceding the battery. Sufficient evidence was presented to negate lawful self-defense and to establish Stevens's culpability apart from the evidence of the statement in question.

Stevens asserts he adduced evidence that he did not make the statement. Specifically, he points out that during cross-examination Smith testified he did not report the statement to the police who interviewed him the night of the altercation. The trial record indeed shows that defense counsel tried to impeach Smith by thoroughly cross-examining him about his failure to report the statement to the police and about his failure to testify during the preliminary hearing that Stevens stopped at the corner and made the statement. During the cross-examination, Smith steadfastly adhered to his testimony that he heard Stevens make the statement and to his testimony about the circumstances at the bar when he heard the statement.

Furthermore, the court instructed the jury under CALCRIM Nos. 226 [factors to consider in judging the credibility of witnesses, treatment of discrepancies in testimony, and evaluation of the testimony of a witness found to have deliberately lied about something], 302 [evaluation of conflicting evidence], and 318 [treatment of a witness's prior statements] on how to evaluate Smith's credibility as a witness. In sum, we are persuaded a result more favorable to Stevens was not a reasonable probability absent the instructional error.

### III. *CUMULATIVE INSTRUCTIONAL ERRORS*

Stevens also contends the court's cumulative errors in the jury instructions arise to the level of prejudicial error requiring reversal. We reject this contention.

A series of trial errors, though harmless when considered independently, may in some circumstances rise by accretion to the level of prejudicial, reversible error. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.)

Here, for reasons already discussed, we have concluded the court did not err in omitting the portion of CALCRIM No. 3470 pertaining to a defendant's right to stand his ground and not retreat. We have also concluded the court's error in failing to include cautionary language in its instructions on a defendant's oral out-of-court statements was harmless. Stevens has failed to demonstrate the existence of cumulative trial errors that rise to a level of prejudice requiring reversal of the judgment. A defendant is entitled to a fair trial, but not a perfect one. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1009.) Stevens has not shown he was denied a fair trial.

#### IV. *RULE 4.420(d)*

Stevens also claims the court abused its discretion in imposing the upper prison term for his conviction of the offense charged in count 1 by improperly relying on a factor that was also an element of that crime, thereby violating rule 4.420(d), which provides that "[a] fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term." Specifically, Stevens contends that in sentencing him to the aggravated, upper term of four years for his count 1 conviction, the court erroneously relied on the "impact on the victim," which he claims is an element of the crime of battery with serious bodily injury (§ 243(d)) charged in that count. For reasons we shall discuss, we conclude Stevens waived this claim of error and, were it necessary to reach the merits of his claim, we would reject that claim.

##### A. *Background*

At the sentencing hearing, after finding Stevens was ineligible for probation, the court stated: "So then the next question is where in the sentencing range the Court should

sentence. The options are 24 months or two years, 36 months or three years, and 48 months or four years. Probation has recommended a sentence at the high end[.] [¶] I listened to all the testimony. To my mind, it is a case that really sticks out. I remember pretty clearly the trial and what was said. I do believe that [Stevens] did not intend to inflict the level of damage that he did. His aim was unlucky in some sense in that the blow was directly to the orbital lobe of the eye, smashing the protective bone around the eye and damaging the eye itself, and if his aim had been different, perhaps it might have been a glancing blow off the skull or a blow to a different part of the head, that would not have resulted in such substantial injury. [¶] On the other hand, however, if his blow had been different, it could have been a blow to the temple or to the throat that actually had potential to kill the victim. [¶] [W]here this injury stands in the scope of what could have happened, it is really perhaps in the middle. It could have been a lot worse, it could have been a lot better for [Naim]."

The court then found that Stevens's act of battery was "completely unprovoked": "[T]he bottom line is that [Stevens] was the person who inflicted this blow. And to my mind, it was *completely unprovoked*. I thought [defense counsel] did a masterful job of getting [Howard] to say that [Naim] was really angry and making it sound like there was sort of a violent proclivity coming from the victim's side. [¶] But, in fact, [Naim] was just playing pool and for some reason he was starting to get hot with [Stevens], and because of some discussion about whether or not they should bet. People get hot with each other every single day, and people lose their temper every day. . . . [¶] [B]ut in my mind this was *100 percent a sucker punch . . .*" (Italics added.)

Shortly thereafter, without a defense objection, the court focused again on the lack of provocation, as well as on the impact of Stevens's violent act on the victim's life and imposed the upper term for Stevens's conviction of the offense charged in count 1:

"[Naim] is a man in his [20's], if I recall correctly. A young man. Basically feels he can't go out in public anymore, that he's a freak because his eye is so mangled. He's been in pain. His vision is bad. But beyond that, his social life is over, and he's returned to his country of origin because he's no longer a young guy, going out on the town with his engineering friends. Now he's a guy who stays close at home. His life has been changed forever. [¶] . . . I cannot overlook the *serious impact on the victim* in this case. For that reason, mindful of the factors in [rule] 4.423, the circumstances in mitigation as persuasively argued by [defense counsel], as well as [rule] 4.421, the circumstances in aggravation, I have considered all of those thoroughly, and although I am mindful, as I said, that I don't think the level of injury was intended to be inflicted, . . . the unreasonable, unnecessary and, frankly, *unprovoked conduct of [Stevens]*, the corresponding *impact on the victim* is such that I do find that the sentence at the high end is the appropriate sentence, so I do impose four years, as recommended by the probation officer." (Italics added.)

#### B. *Analysis*

Citing *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*), the People argue that by failing to object to the upper term at the sentencing hearing, Stevens waived the right to claim on appeal that his sentence was based on an improper aggravating factor. Also citing *Scott*, Stevens maintains he did not waive his claim of error because the imposition

of the upper term resulted in an unauthorized sentence. Stevens's reliance on *Scott* is unavailing.

In *Scott, supra*, 9 Cal.4th at page 356, the California Supreme Court enunciated the rule (the *Scott* rule) that "complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal." The high court indicated that included within the *Scott* rule are "cases in which the stated reasons allegedly do not apply to the particular case, and *cases in which the court purportedly erred because it double-counted a particular sentencing factor*, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons." (*Id.* at p. 353, italics added.)

A relevant and illustrative application of the *Scott* rule is found in *People v. Soto* (1997) 54 Cal.App.4th 1 (*Soto*). In *Soto*, the trial court sentenced a defendant convicted of residential burglary (§§ 459, 460, subd. (a)) to the upper term of six years for that offense, finding as an aggravating factor that the burglary involved planning. (*Soto, supra*, 54 Cal.App.4th at pp. 4, 6.) During sentencing, defense counsel objected that the court was "using the same facts both to aggravate the base term and to impose an enhancement," and further objected to the court's use of "any fact constituting an element of the offense to aggravate or enhance the sentence." (*Id.* at p. 7.) On appeal, the defendant made the more specific objection that the court should not have considered "planning" as an aggravating factor, because planning was an element common to all burglaries, and under rule 420(d) a fact that was an element of the crime cannot lawfully be used to impose the upper term. (*Soto, supra*, 54 Cal.App.4th at p. 7.) The Court of

Appeal applied the *Scott* rule and held the defendant had waived his claim of rule 420(d) sentencing error, stating the defendant had raised only a "cursory" objection to the trial court's "use of a fact constituting an unidentified element of the offense to aggravate and enhance his term." (*Soto, supra*, at p. 9.) The *Soto* court reasoned that "[t]he objection made at sentencing to the court's use of the same facts to aggravate the base term and to impose an enhancement came close to being adequate, but failed to advise the court of which facts, specifically, were the subject of the objection. Without any *specifically articulated* reasons for the objections, the court had no real basis upon which he could evaluate the claims and correct the errors, if any existed." (*Id.* at p. 9.)

The Supreme Court in *Scott* also discussed the "unauthorized sentence" exception to the *Scott* rule, stating, "the 'unauthorized sentence' concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal. [Citations.]" (*Scott, supra*, 9 Cal.4th at p. 354.) The high court explained that "a sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case. Appellate courts are willing to intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing." (*Ibid.*)

Here, as already noted, Stevens raised no objection during the sentencing hearing to the court's statement of reasons for imposing the upper term, including the court's discussion of the impact of Stevens's violent act on the victim, Naim. The upper-term sentence the court imposed in this case is not "unauthorized" within the meaning of the "unauthorized sentence" exception to the *Scott* rule. As already discussed, the *Scott* rule

encompasses cases in which the sentencing court purportedly erred by "double-counting" a particular sentencing factor. (*Scott, supra*, 9 Cal.4th at p. 353.) Also, as we shall discuss (*post*), the count 1 upper term sentence is a sentence that could be lawfully imposed under the circumstances of this case based on circumstances in aggravation separate and apart from the infliction of great bodily injury. We conclude that by not raising his claim of error during sentencing, Stevens waived it. (*Ibid.*; *Soto, supra*, 54 Cal.App.4th at pp. 8-9.)

Were it necessary to reach the merits of Stevens's claim of sentencing error, we would reject that claim. The record shows that in imposing the upper term as to count 1, the court did not rely on a factor that was also an element of the offense charged in that count. Serious bodily injury is indeed an element of the crime of battery with serious bodily injury (§ 243(d)), charged in count 1, of which Stevens was convicted. However, in sentencing Stevens to the upper term, the court considered more than just the serious bodily injury that Stevens inflicted on his victim, Naim. The court also considered the impact of Stevens's violent act on Naim's social life and mental status. Specifically, as already discussed, the court considered that following the attack, Naim perceived himself as a "freak" because of the appearance of his injured eye, and he felt he that he could not go out in public anymore and his social life was over.

Beyond that, the court also reasoned that Stevens's violent act was "100 percent a sucker punch" that was "completely unprovoked." This reasoning supports a finding that Stevens "ha[d] engaged in violent conduct that indicates a serious danger to society" within the meaning of rule 4.421(b)(1), which governs circumstances in aggravation

relating to the defendant. "[G]reat bodily harm," in contrast, is one of the circumstances in aggravation relating to the crime as listed in rule 4.421(a)(1).<sup>4</sup> We conclude Stevens's sentencing error claim lacks merit.

#### V. CUNNINGHAM/EX POST FACTO CLAIM

Last, Stevens contends the court violated the ex post facto clauses (U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9) and *Cunningham*, *supra*, 549 U.S. 270, by considering facts not found by the jury in imposing the upper term sentence as to count 1. Specifically, he complains that in imposing the upper term, the court noted that it took into consideration its opinion that Stevens "sucker punched" the victim without provocation. These "facts," he asserts, were not found beyond a reasonable doubt by a jury. Stevens also points out that the count 1 offense occurred on February 19, 2006; the California Legislature amended the determinate sentencing law (DSL), effective March 30, 2007, more than a year later, in response to *Cunningham*; and the court thereafter sentenced him on November 8, 2007, under the amended DSL scheme, which allowed the court to impose the upper term based on factors not found true by the jury. Conceding that *People v. Sandoval* (2007) 41 Cal.4th 825 held that the amendments to the DSL do not violate the ex post facto clause when applied to crimes committed prior to the amendments, Stevens contends *Sandoval* was incorrectly decided.

---

<sup>4</sup> Rule 4.421(a)(1) provides: "(a) . . . Factors relating to the crime, whether or not charged or chargeable as enhancements include that: [¶] (1) The crime involved great violence, *great bodily harm*, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness[.]" (Italics added.)

Stevens's contentions are unavailing. Our Supreme Court in *People v. Sandoval*, *supra*, 41 Cal.4th at pages 853-858, concluded that the application of the amended DSL to crimes committed before its enactment does not violate the prohibition against ex post facto laws. We are bound to follow *Sandoval*. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.) Therefore, we need not reach the People's claim that Stevens forfeited his claim on appeal by failing to object at the sentencing hearing.

#### DISPOSITION

The judgment is affirmed.

---

NARES, Acting P. J.

WE CONCUR:

---

HALLER, J.

---

O'ROURKE, J.